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No._____

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IN THE

Supreme Court of the United States

October Term, 1981

DuBROOK, INC., a corporation,

vs.

THE W. B. GIBSON COMPANY, a corporation,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LEE C. McCANDLESS
FRANK P. KRIZNER
301 Morgan Center
Butler, Pennsylvania 16001
Attorneys for Petitioner

McCANDLESS, KRIZNER & PRICE
of Counsel

Batavia Times Publishing Co.
Pittsburgh, Pa. (412) 881-7463

Question Presented

Did the Third Circuit Court of Appeals deprive the petitioner of its constitutionally protected property and contract rights, where it affirms without opinion a District Court decision, which ignored relevant and clear terms of the written agreements, made no independent determination of the substantive issues, and handed down a decision which is in conflict with decisions in the same matter in other Courts?

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The W. B. Gibson Company, an Ohio Corporation, the petitioner herein, prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals, Third Circuit, entered in the above case on November 30, 1981.

Opinions Below

The Opinion of the United States District Court for the Western District of Pennsylvania is unreported and is printed in Appendix A. The affirmance by the United States Court of Appeals for the Third Circuit as set forth in its Judgment Order of November 30, 1981, is also printed in Appendix A.

Jurisdiction

The judgment of the United States Court of Appeals (Third Circuit) was entered November 30, 1981 (Appendix B, p. A18). A timely Petition for Rehearing was denied December 23, 1981 (Appendix C, p. A20). The jurisdiction of the Supreme Court is invoked under 28 USC 1254(1).

Statement of Case

Basis of Jurisdiction in Court Below.

This case was initially filed in the Common Pleas Court of Butler County, Commonwealth of Pennsylvania. It was removed to the Federal District Court for the Western District of Pennsylvania on the basis of diversity of citizenship, the amount in question being more than $10,000 and the parties being citizens of different States. (28 USC 1332).

An appeal was taken to the Third Circuit Court of Appeals from the final judgments entered by the District Court in accordance with 28 USC 1291.

Statement.

The petitioner, a general contractor, was the successful bidder for a contract to construct a sewerage disposal plant in the Borough of Zelienople, Pennsylvania, for

$3,845,000.00 to be paid for by a Federal Grant and the local municipality.

The general construction contract between the owner and the petitioner provided that the concrete to be used in the construction of the plant was to attain, within 28 days after it was in place, a compression strength of 4,000 pounds of pressure per square inch.

All relevant provisions of the general contract were required to be integrated into all subcontracts, accordingly all subcontracts were to be let in accordance with the terms of the general contract and specifications.

The general contractor, The W. B. Gibson Company, after investigating the concrete suppliers in the area, entered into a contract with DuBrook, Inc., a corporation. This subcontract was approved by the construction engineers for the owner. Based upon the cost quotation by the suppliers Gibson calculated its bid for the entire project.

One of the major provisions of the complete integrated contract and in particular the subcontract with DuBrook, required that the concrete after being placed would attain a compression strength of 4,000 pounds of pressure per square inch in 28 days.

At the time of delivery of the concrete, cylinderical samples about 12 inches long and 6 inches in diameter were taken and delivered to West Penn Testing Laboratory for testing 28 days later. By the time the first test results were received by the petitioner, 840 cubic yards of concrete had already been poured in the foundation of the structure. The test results indicated that the concrete in place did not meet the contract specifications and the contractor was notified not to con-

tinue to pour additional concrete until the problem was corrected. It was generally agreed the faulty concrete already in place could be retained, however, it was to be covered and kept heated until it reached the specified strength, which procedure caused a five months' delay. When construction resumed, it was found the new concrete delivered also failed to meet 4,000 pounds of pressure per square inch in 28 days. The petitioner changed the supplier of concrete and had no more trouble on the project with faulty concrete.

DuBrook sued on the contract to recover for concrete not paid for in the sum of $20,156.00 and for its loss of profits for concrete delivered by the second supplier in the sum of $7,277.00. Judge Simmons, substituting for Judge Snyder, who died after the close of the testimony but before rendering a decision, entered judgment against the petitioner for $27,433.00 plus interest. The petitioner had counterclaimed for delay damages caused by the extra ordinary procedure needed to cure the concrete failing to meet 4,000 pounds of pressure per square inch in 28 days, extra costs and loss of profit. The decision judge found against Gibson on the counterclaim, fortifying his decision by stating that Gibson's testimony was unbelievable. This was affirmed by the Third Circuit Court.

The case did not present a question of credibility, since relevant evidence was documentary or undisputed. Both the original suit and the counterclaim were based on the interpretation of the contract. Both parties recognized it but the Court did not apply its terms to both parties. Selective application of the contract provisions is not the rule of law. The contract must be considered as a whole not as the District Court construed it.

Although cylinderical samples are taken upon delivery of concrete in its plastic state, there is no way of telling that it meets the required standard until 28 days after delivery when the samples were tested. This is the very reason for binding the parties to this requirement in the contract. The District Court held, however, that this provision did not apply to DuBrook for the reason the supplier was selected by the general contractor with the approval of the owner. The Court concluded that notwithstanding the terms of the contract it was the general contractor who assumed the risk of faulty concrete even though the owner's engineers approved the formula for the mix, and it was DuBrook who by their subsequent subcontract assumed such obligation and, in fact, mixed the concrete.

Undisputed and unrebutted expert testimony established that the poor concrete was caused by the use of an additive that was absolutely and exclusively in the control of the subcontractor, DuBrook. The Court ignoring this fact and the clear provisions in the contract based its decision on irrelevant matters, depriving the petitioner of its property and contract rights.

In every Federally funded construction project the rights and obligations of the parties will be identified in a contractual arrangement involving integrated documents similar to those in the case at bar. Without reference to the application for Federal Grants made by the owner, the prime construction contract can be easily identified as the general contract and specifications prepared by the owner or his agent or engineer and used as the basis for bidding. All of these contracts contain a provision requiring that the specifications set forth in the prime contract, in conformity with the Federal guidelines, be incorporated into subcontracts which might be

let by the general contractor. The entire contractual arrangement clearly evidences a well developed plan whereby the funding agency can look to the owner, to the general contractor, and to each of the subcontractors, or their subcontractors, in the event of a breach or in the event of a design or construction problem. In the case at bar, the District Court in its Decision, which was affirmed by the Third Circuit Court of Appeals concludes that the provisions of the prime contract are not applicable to subcontractors. In addition, any liability of the subcontractor which might be based upon the integration of the documents, can be easily and unilaterally waived.

The prime contract between the owner and Gibson, the general contractor, was incorporated by reference into the subcontractor between Gibson and DuBrook. This was not disputed by any party and, in fact, was acknowledged by the principals of DuBrook in their testimony. One of the requirements of the prime contract and the subcontract was that the concrete used in the construction of the sewage treatment plant must obtain a compression strength of 4,000 pounds of pressure per square inch at the end of 28 days. It is a fact that the strength of concrete increases for a period of time at a rapid rate and theoretically after a certain period would increase at a slower rate. The measure of the strength of concrete therefore is directly related to the speed at which it is cured and at which it will reach its maximum strength. To determine if the concrete in place is hardening at the required rate, it must be tested at different intervals of time. Hence, the test at 28 days.

It is a fact that is worthy of judicial notice that the strength of concrete in a sewage treatment facility is one of the most critical considerations. This is recognized by

all parties and is made a part of the contractual obligations. This most critical aspect, therefore, is to be a burden and liability placed upon all parties who are involved with the construction of the treatment plant requiring the use of concrete.

The District Court absolved the supplier of any liability under the express written contract. The Court concluded that an attempt by the owner and the general contractor to prescribe a formula which was developed to help insure the use of concrete of the proper strength, was a fact that removed the subcontractor who supplied the concrete from any liability under the written documents.

It is impossible to envision how an owner or a general contractor may more clearly bind a subcontractor to the requirement of providing concrete of a given strength in 28 days. If this Court permits the interpretation of the contractual documents by the District Court and the Third Circuit Court to stand, the effect of this determination upon the construction industry would be to place suppliers of semi-manufactured products, such as concrete, in a position beyond the scope of any contractual liability.

The integrated documents are contracts with provisions that speak for themselves. The subcontractor agreeing to those terms accepts the liability for his failure to deliver concrete of a specified strength. Unless the terms are waived in accord with the provisions of a contract between the supplier and the general contractor liability must be predicated upon the written provisions.

The Court in construing the provisions of an integrated contract must first consider which documents were intended as part of the total agreement. It must then

construe all of these provisions together as a whole to determine what the intent of the parties might be. It is error to overlook this intent and to adopt one provision as the entire substance of the agreement. This in fact was the direction taken by the District Court in the case at bar.

The petitioner gave a written order for the supplying of concrete to DuBrook on April 7, 1977. Both parties pled and relied on this order as part of the contract between the parties. The order incorporated specifications contained in the prime building contract.

The relevant specifications are as follows:

"3. *MIX DESIGN*

B. Water—Cement Ration and Compressive Strengths

All Class A concrete shall have a maximum water content of 5.6 gallons per sack of cement including the free moisture in the aggregates and a minimum compressive strength of 4,000 pounds per square inch at 28 days.

D. *Air Engrainment*

The amount of air entrained in the concrete shall be five (5) ÷ one (1) percent, by volume as determined by direct measurement or by ASTM C-138."

Both parties had access to the above specifications prepared by the engineer for the project.

The District Court, which was not the Trial Court, construed this contract against the petitioner in that it required the purchase of all concrete for the project from the supplier, DuBrook, and on failure so to do rendered a judgment against Gibson. Further the Court denied the

petitioner the right to recover for construction delay caused by the failure of the concrete to meet the compression strength in 28 days of 4,000 pounds of pressure per square inch, on the grounds that this provision was not enforceable because of the control Gibson had over inspection of the concrete. The Circuit Court in a panel decision affirmed without an opinion.

It is submitted the decision evidences a lack of understanding that the compression strength could not be determined by actual test until 28 days after the concrete was in place. For this reason the duty to meet this requirement was placed by the specifications and order on the supplier, DuBrook. It is undenied that the concrete supplied by DuBrook did not meet this standard.

The testing process, that is, which tests could produce results when the concrete was poured and in its plastic state, was not understood by the Court.

When unloading a truck of concrete, the contractor, under direction of the owner's engineer, takes preliminary air tests and slump tests and if the concrete is not workable, or is low on total air, requires additional water or air. He then takes a sample which is cylinderical, about 12 inches long and 6 inches in diameter which is delivered to the testing laboratory for further testing to determine whether or not the concrete poured is of such quality that in 28 days after pouring it will meet the compression test specified by the contract. Because this is the only reliable testing method it was essential that the supplier agree by contract to deliver concrete that will reach this compression test.

Pouring started June 21, 1977, on this project and after 840 cubic yards had been poured at the base and most critical point in the project, the construction

engineer for the Authority orally notified the contractor to stop pouring concrete on what had already been placed. When the cylinder samples, after waiting 28 days, were tested it showed that 29% of the 840 cubic yards of concrete had not met the required standard of 4,000 pounds of pressure per square inch in 28 days. All of these first pours were placed in the critical foundation portion of the project.

On September 27, 1977, the construction engineer notified the contractor in writing that no further work was to be accomplished in the area where the faulty concrete was used except at the contractor's risk. This meant that the contractor might be required to dig out all the concrete placed and pour new concrete.

This was averted by an extended curing process which consisted of covering, heating and keeping the concrete wet.

The construction schedule called for all concrete to be poured by December 17, 1977, so that the sheltered inside work could be done during the winter months. No further pouring of concrete was done until after the curing process was completed in the spring of 1978.

No one contested the delay had been caused by the concrete not attaining 4,000 pounds of pressure per square inch in 28 days. However, the Court has absolved the supplier from any obligation to perform this part of the contract, relying on the fact that the contractor was required to make tests as to air, slump, and provide testing cylinders for the testing laboratory to make the test 28 days after the concrete was in place.

The contractor, petitioner herein, had no control over the mixing of the concrete. The mix design had been tested by the West Penn Testing Laboratory, Inc., which showed if properly mixed in the proper sequence it would result in 5250 pounds of pressure per square inch in 28 days. Consequently, the mix design gave to the supplier plenty of leeway when it only required the concrete to reach 4,000 pounds of pressure per square inch in 28 days.

It is submitted the Court has overlooked the responsibility of the supplier under the contract. Since there was no way of telling prior to the concrete being in place for 28 days whether it reached the compression strength or not, the obligation to produce concrete which will meet this specification is on the supplier who professed to be an expert in the field.

In so contracting, the ordinary provisions used in the construction industry were inserted in the contract, requiring the supplier to produce concrete according to the designated mix that would reach the required compression strength. If this cannot be required in a construction contract and is not binding on the supplier, then the substance of the contract has been destroyed for the compression strength cannot be determined for 28 days after the concrete is poured.

The mixing of concrete and adding the air entrainment agent was completely under the control of the supplier, DuBrook. The President of DuBrook testified that by its contract it was bound by all the terms of the general specifications incorporated into the order.

DuBrook's expert testified that DuBrook was bound to produce concrete that attained 4,000 pounds of pressure per square inch in 28 days. Thus DuBrook by its own testimony recognized its duty under the contract.

The engineer for the owner required core drilling tests to be taken of the poured concrete under the direction of West Penn Testing Laboratory who found the initial test results from the 28 day cylinder tests were corroborated by the core tests. These core drillings were sent to Erlin Hines Associates in Chicago, and a spetrographic study of the cylinders was made. It was determined the test from the areation tank base and the chlorine tank base showed a range of compressability strength from 2650 to 3690 pounds of pressure per square inch, all under the requirements of the contract. Erlin Hines, the expert whose testimony was not contradicted, testified the lack of compression strength was caused by an excess of air entrainment agent, and not excessive water. This ingredient was exclusively under the control of DuBrook at the time of mixing.

After this testimony the Hearing Judge and all parties agreed that water and slump were out of the case and the sole cause of the faulty concrete was the entrained air.

Reasons for Granting Writ

The decision of the District Court, as affirmed by the Third Circuit, was precisely the position taken by the District Court in *Henry C. Beck Company vs. Ross Island Sand & Gravel*, 456 F 2d 319 (9th Cir., 1972), which was reversed on appeal stating:

> "By specifying the addition of Pozzolith 3L to the concrete, plaintiff assumed the risk that concrete containing such admixture might fail to set and harden the normal rates and might contain excessive entrained air with consequent loss of compression strength."

On appeal the Circuit Court for the Ninth Circuit clearly and unequivocally stated that this conclusion was erroneous. The Appellate Court for the Ninth Circuit determined that if a risk of liability was assumed by the general contractor and the owner under provisions of a contract similar to the ones in the case at bar, it was a risk of the use of concrete with a proper amount of admixture. The holding by the District Court in the case at bar, as affirmed by the Third Circuit, was directly opposed to the holding of the Circuit Court for the Ninth Circuit.

The Beck Court, however, did not consider the application of integrated documents because the matter was not raised on appeal. The Court did, however, apply the 28 day strength requirement to the supplier. In addition, in the case of *John Ash Associates, Inc. vs. Envirogenics Co.*, 425 F. Supp. 238 (1977), the Court considered whether or not the general conditions of a prime construction contract were incorporated by reference into a subcontractor's agreement where there were no clear and unequivocal references in any of the documents to an in-

corporation of the general conditions in the purchase order. In that case, the Court concluded that the general conditions in the prime contract were a part of the subcontract agreement. The Court stated:

> "While we do not lightly dismiss the lack of actual notice to plaintiffs of the incorporation, they are nonetheless held to have been given sufficient constructive notice to support the incorporation by reference of the 'general conditions' in their entirety into the contract."

The Court concluded that surrounding circumstances could be reviewed to determine that such incorporation was intended. In the case at bar, DuBrook was referred specifically to the prime contract in the purchase order and was advised that work was to comply with the specifications and drawings contained in that contract. Clearly, DuBrook had more than constructive notice that the general conditions of the prime contract were meant to be incorporated by reference in the purchase order agreement between DuBrook and Gibson.

The case of *Lease et al. vs. Corvallis Sand & Gravel Co.*, (9th Cir., 1972), 456 F 2d 316, is a case involving a subcontractor furnishing concrete required to have a compression strength of 3,000 pounds of pressure per square inch in 28 days. It was held the standard specifications between the owner and contractor applied to the subcontractor and he was bound by his purchase order to produce the concrete that would achieve this compression test. This case also recognized that adding water at the job site was a customary practice.

In the case of *Brown v. Payne-Ladewig, Inc.*, (Texas Appeals Court), 568 S. W. 2d 159, the general contractor received a bid on a subcontract for the installation of

heating and air conditioning units in a housing project on an Army base. Upon the inability of the subcontractor to perform the general contractor secured the items from another supplier at a greater cost. The Court held the defaulting subcontractor was liable for the general contractor submitting a bid. A contractor must be able to rely on a price quoted by a proposed subcontractor in order to make a firm bid, otherwise no contractor could bid with certainty and this would affect the entire building industry.

The four cases hereinbefore mentioned, two from the Ninth Circuit, one from the District Court, and one from the Texas Court of Appeals, all set down principles of law which are opposite to the findings of the Court below and affirmed by the Third Circuit Court. It is the petitioner's contention, therefore, that this Petition for a Writ of Certiorari should be granted and a review of the law of this case should be made.

It is submitted in affirming the judgment of the Court below the Appellate Court (Third Circuit) approved an erroneous interpretation of the contract making its terms apply to the general contractor as to the quantity of concrete to be purchased but not to the supplier as to the quality of the concrete to be supplied.

The decision court did not see or hear the witnesses and the sole question is one of interpreting the written contract which both parties admit and rely upon for recovery.

The Appellate Court ignored the cannons of interpretation it laid down when it approved Secs. 235 and 236 of the *Restatement of Law of Contracts* in the case of *Capitol Bus Company vs. Blue Bird Coach Lines, Inc.*, (1973, 3rd C.A.), 478 F 2d 556, when on Page 560 it stated:

> "A contract is to be considered as a whole, and, if possible, all its provisions should be given effect; while a contract's provisions must be interpreted with reference to the whole the specific controls the general; and a contract should be construed so as to give effect to its general purpose."

It is obvious that the general purpose of the specifications and the purchase order, incorporating them into the contract, was to assure Gibson that he could rely on the concrete delivered as meeting the terms of the contract and specifications. After 28 days the concrete was to reach 4,000 pounds of pressure per square inch. This it did not do. DuBrook, not Gibson, the contractor, violated the general purpose of the contract and the specific provisions therein.

After the death of the trial judge the decision court adopted *in toto* the Findings submitted by opposing counsel and then fortified his Opinion by stating the position of the petitioner was unbelievable. This was done even though the written contract was admitted and relied upon by both parties. The Court interpreted its terms to apply to one party but not to the other.

In the case of *United States vs. El Paso Natural Gas Co.*, (1964), 376 U.S. 651, 84(a) S. Ct. 1041, in an Opinion by Mr. Justice Douglas on Page 1047 it is stated:

> "Those finding, though not the product of the workings of the District Judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence.* * * Those drawn with the insight of a disinterested mind are, however, more helpful to the Appellate Court."

Conclusion

The written integrated contract involved in this case is in general usage in the construction industry. If the decision of the Third Circuit Court of Appeals is permitted to stand applying the terms of the contract to the general contractor as to quantity but not to the supplier as to the quality, a general contractor could not bid with certainty and construction costs would necessarily be greatly increased.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LEE C. McCANDLESS
FRANK P. KRIZNER
McCANDLESS, KRIZNER & PRICE
Attorneys for Petitioner